IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-333

STATE OF MICHIGAN,

Petitioner,

vs.

JAMES MILLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent James Miller respectfully requests this Honorable Court to deny the petition for writ of certiorari.

OPINIONS BELOW

Review is sought for the opinion of October 7, 1981 by the Michigan Court of Appeals (Petition Appx A pp 12-20). The opinion is reported as follows: People v James Miller, 110 Mich App 270; 312 NW2d 225 (1981) lv denied 413 Mich 890; ___ NW2d ___ (1982) (Petition Appx D pp 25-26); reconsideration denied 414 Mich ___; ___NW2d ___ (1982).

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE MICHIGAN COURT OF APPEALS CORRECTLY HELD NEW YORK V BELTON INAPPLICABLE WHERE RESPONDENT WAS A PEDESTRIAN ARRESTED NEAR THE CAR HE HAD EXITED RECENTLY BUT BEFORE ANY POLICE CONTACT OCCURRED, AND WHERE THE SEARCH WAS INTO THE INTERIOR OF HIS BRIEFCASE WHICH HE LEFT INSIDE THE CLOSED CAR.

II. WHETHER THE MICHIGAN COURT OF APPEALS CORRECTLY DECLINED TO APPLY, ON AN AD HOC BASIS, THE BRIGHTLINE RULE OF NEW YORK V BELTON, TO A DIFFERENT KIND OF FACTUAL SETTING THAN THAT FOR WHICH THE RULE WAS DESIGNED.

THE STATUTES INVOLVED

MCL 750.227; MSA 28.424 provides:

> "A person who shall carry a dagger, dirk, stiletto, or other dangerous weapon except hunting knives adapted and carried as such, concealed on or about his person, or whether concealed or otherwise in any vehicle operated or occupied by him, except in his dwelling house or place of business or on other land possessed by him; and a person who shall carry a pistol concealed on or about his person, or, whether concealed or otherwise, in a vehicle operated or occupied by him, except in his dwelling house or place of business or on other land possessed by him, without a license to carry the pistol as provided by law or if licensed, carrying in a place or manner inconsistent with any restrictions upon such license, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years, or by fine or not more than $2,500.00. Amended by P.A. 1973, No. 206, Sec. 1, Eff. March 29, 1974."

MCL. 7403(2)(A)(iii), MSA 14.15 (7403)(2)(a)(iii) provides:

> "Sec. 7403. (1) A person shall not knowingly or intentionally possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practioner while acting in the course of the practitioner's profesional practice, or except as otherwise authorized by this article.
>
> (2) A person who violates this section as to:
>
> (a) A controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(iv),and:

* * *

(iii) Which is in an amount of 50 grams or more, but less than 225 grams, of any mixture containing that substance is guilty of a felony and shall be either imprisoned for not less than 10 years nor more than 20 years or placed on probation for life.

COUNTERSTATEMENT OF THE FACTS

Respondent rejects Petitioner's Statement of Facts (Petition pp 5-6) and accepts the factual recitation found in the opinion below, People v Miller, 110 Mich App 270, 272-274, 277; 312 NW2d 225, 226-227, 228, as a more complete and accurate statement.

The original charges were two: Count I, carrying a pistol in a motor vehicle, MCL 750.227; MSA 28.424; and Count II, possession of a controlled substance, a narcotic drug weighing less than 50 grams,i.c., .0148 grams of power containing heroin. MCL 333.7403(2)(a)(iii); MSA 14.15(74003)(2)(a)(iii). Only the evidence relating to Count II has been ordered suppressed. The powder was contained in two coin envelopes which were inside a closed zippered interior of a briefcase. The briefcase was on the front seat of a parked and closed automobile. At the time of the stop and arrest no one was inside the automobile. The automobile had stopped on its own and parked at the curbside and the two occupants had gotten out when the police car pulled to the rear and parked. Two officers got out of the police car and one hailed Respondent Miller, who was not an occupant of the automobile, but a pedestrian.

Respondent reserves the right to refer to or quote the record below. Pertinent matters from the record include the following:

(a) THE INITIAL SIGHTING OF THE BRIEFCASE OCCURRED WHILE RESPONDENT WAS A PEDESTRIAN.

When Officer John Kouse first saw the briefcase in question

it was being carried by Respondent Miller nowhere near the car. Miller was observed coming from between two houses on the west side of Appoline Street (R 4,6) (R refers to the transcript of the March 20, 1980 preliminary examination). Officer Reuse then observed Miller carrying the briefcase to a 1970 Oldsmobile which he entered on the passenger side (R 5, 6-7).

(b) THE SECOND SIGHTING OF THE BRIEFCASE OCCURRED WHILE RESPONDENT WAS A PEDESTRIAN.

Officer Reuse later observed Miller leave the parked Oldsmobile carrying the briefcase. Both the driver of the Oldsmobile and Miller got out. The following quotations are from Officer Reuse's testimony. "As they turned around to shut the doors Mr. Miller observed us" [there was another officer with Reuse] "out of the car. . ." (R 7). After Miller looked in the direction of the two officers he "took the briefcase that he had in his hand and threw it onto the front seat of the car and slammed the car door and turned and started walking away" (R 8). "After he threw the briefcase in the car he walked in a westerly direction and the driver slammed his door and looking in our direction, walked in an easterly direction." (R 9).

(c) THE STOP, THE THIRD SIGHTING OF THE BRIEFCASE AND THE ARREST OCCURRED WHILE RESPONDENT WAS A PEDESTRIAN.

"We stopped them both to investigate the possible traffic violation. . . and the possibility of contraband from a B & E being in the car" (R 9). "We asked both the people that were in the car for identification. As Mr. Miller was digging for identification, with the aid of my flashlight I shined the light in the vehicle, the windows were rolled up, through the windows and I observed in a side pouch of a brown leather briefcase a nickel-plated automatic" (R 9). Up until that time neither of the two pedestrians were under arrest (R 9). Both the driver and Miller were placed under arrest for carrying a concealed weapon in a motor vehicle (R 10).

(d) THE PLAIN VIEW OF THE WEAPON AS THE BASIS FOR THE ARREST

Officer Reuse and his partner had no specific information about a breaking and entering having in fact occurred and Reuse saw no violation of the law by Miller aside from the weapon (R 16). Reuse was standing next to the passenger door of the Oldsmobile when he called to Miller to halt. Miller returned to where Reuse stood (R 19-20). The driver also halted and returned to the other officer who was east of the Oldsmobile (R 26). The briefcase was on the front seat laying against the seat back. The revolver was in an open pouch in clear view (R 12). At the time Officer Reuse saw the briefcase in the car he saw the revolver (R 17, 23). The pouch opened on the side of the briefcase (R 18).

(e) THE SEARCH OF THE INTERIOR CLOSED (ZIPPERED) COMPARTMENT OF THE BRIEFCASE OCCURRED WHILE RESPONDENT WAS HANDCUFFED AND SEATED IN THE BACKSEAT OF THE CAR.

Both prisoners were conveyed to the precinct along with the briefcase and revolver (R 10). Miller did not give Reuse permission to take the briefcase; he was in the scout car and handcuffed at the time Reuse entered the Oldsmobile to remove the briefcase (R 24). Officer Reuse testified that "we confiscated the briefcase along with the weapon as evidence in a possible criminal case, as a custodial search which would be performed on any items confiscated relating to a specific crime." (R 26). The search of the interior of the closed (zippered) briefcase occurred on the scene and produced two manila coin envelopes which contained, allegedly, a substance composed in part of heroin (R 10).

(f) THE EVIDENCE SUPPRESSED WAS THE POWDER FOUND INSIDE THE CLOSED INTERIOR OF THE BRIEFCASE.

The trial in this case is pending. After the revolver and

the alleged narcotics were suppressed by the trial court the prosecution appealed. The Michigan Court of Appeals upheld only the suppression of the narcotics. The Michigan Supreme Court declined to review that ruling.

REASONS FOR DENYING THE WRIT

I. THE PETITION IS UNTIMELY

On April 30, 1982, the Michigan Supreme Court issued an order which is a final judgment. People v Miller, 413 Mich 890; ___NW2d___ (1982). (Petition Appx D, p.25). On August 24, 1982, one hundred sixteen days later, the petition for writ of certiorari was filed. In the interim, Petitioner filed an untimely application for rehearing in the Michigan Supreme Court (on or about June 15, 1982). On June 16, 1982 the application for rehearing was denied as untimely. People v Miller, 414 Mich __ ; ___NW2d___ (1982). (Petition Appx E p 27). (See General Court Rules of Michigan, GCR 1963 862.2 and 864.4).

Under Michigan law, orders by the Supreme Court of Michigan other than those by opinion become effective on the date of entry. GCR 1963, 866.4. Jurisdiction in the Michigan Supreme Court terminates upon the entry of a final order unless a timely motion for reconsideration is filed. People v George, 399 Mich 638, 640; 250 NW2d 491, 492 (1977). The time for filing the petition for writ of certiorari began to run from April 30, 1982. American Railway Express Co. v Levee, 263 US 19, 20-21; 44 SCt 11; 68 LEd 140 (1923).

The petition for writ of certiorari is untimely because it was due sixty days after April 30, 1982 and was filed in almost twice as many days. Rule 20.1, Revised Rules of the Supreme Court of the United States (1980).

No motion to extend the time for filing of the writ has been filed to date. Rule 29.2. Even had such motion been filed and granted, the thirty day extension permitted under Rule 20.1 has still been exceeded.

While waiver of the untimely filing of the petition is discretionary, in an interlocutory appeal such waiver ought to be considered, if at all, only after a showing of good cause has been made on an appropriate motion by Petitioner. Respondent's speedy trial right, US Const Am 6, 14, is encroached upon by the untimely acts of Petitioner. Respondent objects to the untimely filing of the petition for writ of certiorari and requests that this Honorable Court deny the petition.

II. NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THIS CASE.

A THE MICHIGAN COURT OF APPEALS CORRECTLY HELD NEW YORK V BELTON INAPPLICABLE WHERE RESPONDENT WAS A PEDESTRIAN ARRESTED NEAR THE CAR HE HAD EXITED RECENTLY, BUT BEFORE ANY POLICE CONTACT OCCURRED, AND WHERE THE SEARCH WAS INTO THE INTERIOR OF HIS BRIEFCASE WHICH HE LEFT INSIDE THE CLOSED CAR.

1. INTRODUCTION

The Michigan Court of Appeals correctly applied the Fourth Amendment of the United States Constitution, US Const AM 4,14, and the decisional law of this Honorable Court, to the facts of this case. There is no difficulty posed by this case which requires review by the Court. The Court of Appeals has not demonstrated any flawed interpretation or understanding of the rules governing the search incident to arrest exception to the Warrant Clause of the Fourth Amendment. The application in this case of search-incident law is entirely consistent with the opinions of this Honorable Court.

Petitioner seeks a dramatically expanded application of the rule of New York v Belton, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981) which the Michigan Court of Appeals considered and rejected as obviously lacking in merit and thus deserving summary disavowal by eloquent silence. In short, the Court of Appeals deemed the search-incident rule of Belton as not being applicable at all to the facts of this case. Moreover, the Court of Appeals deemed New York v Belton, supra, distinguishable from this case, which it is. This case is not a Belton-type of case; it does not fit within the paridigm fact situation of Belton. Petitioner is simply unhappy with the result below. Petitioner seeks an extreme and unwarranted extension of New York v Belton, which the Michigan Court of Appeals adequately and carefully considered, and consistently with Belton itself, rejected as nonmeritorious. Belton is inapposite to the present facts.

This case is not governed at all by the rule of New York v Belton, supra. Belton was designed for cases where a police officer removes the occupants from their vehicle. Respondent, however, was a pedestrian who was returned by police order to the area of the vehicle he had previously exited. Respondent did not exit his vehicle on a police directive. There was no occupant of the vehicle who posed a danger to the officer involved. The officer removed no one from the vehicle. The arrest of this pedestrian occurred near the vehicle because the officer caused it to occur there. Respondent was handcuffed and seated in the rear of the police car when the search of his briefcase occurred. This case is not a Belton case. (See II, B. infra).

Moreover, the Court of Appeals properly and correctly declined to apply the fixed-rule of Belton on an ad hoc basis to a case clearly outside the paradigm fact situation described by Belton itself. The justification for a "bright-line" or "standardized" rule lies in the existence of the paradigm situation to which that rule always applies. Applications of a fixed-rule on a case-by-case basis outside of the paradigm fact situation destroys the concept of a standardized rule. The Michigan Court of Appeals merely recognized that the Belton paradigm is missing from this factual setting and that there was no justification for applying the narrow and particular fixed rule of Belton here. It would have been inappropriate to have done otherwise. The opinion below declined to extend the rule of Belton, did not destroy the concept of standardization, and reached exactly the kind of result Belton calls for when its paradigm fact situation is not present. There is no substantial federal question posed here. The writ should be denied.

2 THE SOLE QUESTION IS WHETHER THE BRIGHT-LINE RULE OF NEW YORK V BELTON APPLIES TO THIS FACTUAL SETTING.

Since the revolver seized from the exterior side-pocket of the briefcase has not been suppressed it is relevant here only as evidence of the alleged violation of MCL 750.227; MSA 28.424[1] The search of the briefcase's interior is all that is involved here. That search produced the two coin envelopes and contents. Petitioner does not argue, and has never argued below, that there was probable cause to search the briefcase's interior. The record will not support, and contradicts, any view that Officer Reuse searched the interior of the briefcase based on his belief or understanding of the probabilities that he would find narcotics or anything else inside (R 26). This case is not a search-probable cause case and United States v Ross, 456 US ___; 102 SCt 2157; 72 LEd 2d 572 (1982) is not controlling.

Also not before the Court is the correctness of the decision below, i.e., that an inventory rationale does not authorize the search of the briefcase's interior. Nor could it seriously be argued that plain view somehow supported the interior search of the closed briefcase. The record further belies any consent by Miller as justification for the search in question (R 24).

The sole question presented is whether the search incident to arrest rule of New York v Belton, supra, applies to these

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1 In Michigan a pedestrian who carries a somewhat concealed revolver in his pocket may be arrested and tried for carrying a concealed weapon. MCL 750.227; MSA 28.424; People v Stirewalt, 16 Mich App 343;167 NW2d 779 (1969). The same statute prohibits carrying a weapon in a motor vehicle, being an operator or occupant thereof and participating in the act of carrying. People v Butler, 413 Mich 377; 319 NW2d 540 (1982). Thus, in the case at bar Officer Reuse could have arrested Miller for being a pedestrian carrying the revolver partially concealed in the briefcase prior to entering the Oldsmobile. While the officer's claim that he arrested Miller for occupying a motor vehicle and carrying the revolver therein is not unfounded, that claim does permit a certain measure of police manipulation of the Fourth Amendment. If Miller had been stopped carrying the briefcase on the street with the revolver exposed to view in the side pouch the officer should not be allowed to then search the Oldsmobile's interior under a search-incident theory merely by virtue of manipulating the label of the charge.

facts. The general search incident to arrest rule, or its scope, under Chimel v California, 395 US 752; 89 SCt 2034; 23 LEd2d 685 (1969) or United States v Robinson, 414 US 218; 94 SCt 467; 38 LEd2d 427 (1973) is not at issue in this case. Respondent was never stopped in his car and ordered to alight so that the rules of Pennsylvania v Mimms, 434 US 106; 98 SCt 330; 54 LEd2d 331 (1977) and Gustafson v Florida, 414 US 260; 94 SCt 488; 38 LEd2d 456 (1973) are not involved in this case.

Solely involved here is the stop and arrest of a pedestrian on the street who previously had deposited his briefcase into a nearby container. That container might have been a trash can in an alley, a neighbor's fenced yard, a child's red wagon or even a stranger's car.[2] In this case that container happened to be a car in which he had recently been an occupant. While a Chimel search-incident analysis may be useful in determining the search power of the officer, the rule of New York Belton is not. The question presented is whether Belton applies at all.

B. RESPONDENT WAS A PEDESTRIAN; HE WAS NOT REMOVED FROM THE CAR THUS, THIS CASE IS DISTINGUISHABLE FROM NEW YORK V BELTON.

As Mr. Justice Powell wrote in Robbins v California, 453 US 420, 431; 101 SCt 2841; 69 LEd2d 744, 753 (1981): "Belton presents the volitile and fluid situation of an encounter between an arresting officer and a suspect apprehended on the public highway" (Powell J., concurring, Robbins, supra, 431). By

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2 Had Miller tossed the briefcase into a car he had not been seen to occupy or operate the justification for seizing the revolver would be a plain view rationale, not a search-incident rationale. The same reasoning governs the interior search of the briefcase. That Miller deposited the briefcase into the Oldsmobile signifys a greater expectation of privacy then had he abandoned it. Miller's constitutional protections should therefore be correspondingly greater because he placed the briefcase in the Oldsmobile than if he had not placed it there.

contrast, there was no stop of a moving vehicle in this cause and the officers did not direct the occupants of the automobile to get out and stand aside. Rather, just as in Colorado v Bannister, 449 US 1; 101 SCt 42; 66 LEd2d 1 (1980), the revolver was seized on a plain view rationale. Unless the rule of New York v Belton, supra, is expanded it cannot justify either the seizure of the revolver or the interior search of the briefcase. The Belton rule applies when a police officer reasonably directs the occupant(s) of an automobile to get out and stand aside. Having done so the officer, who then arrests the occupant(s), retains the constitutional authority to search the passenger compartment and containers therein. Although in Belton probable cause to arrest the occupants preexisted the order to alight the automobile, Belton is also applicable even when the officer develops probable cause to arrest after making the order to alight. The rule is designed to afford protection to the officer from dangerous weapons which the occupant(s) - qua occupants - may have access to if they remained in the automobile.

Respondent notes that Belton is not limited to the narrower class of cases in which probable cause to arrest preexists the order to alight. If Belton were to be so limited the present case would be highly distinguishable. But this case is also distinguishable from Belton even given Belton's application to cases where an officer orders the occupant(s) to alight, and probable cause arises after such order. The touchstone of Belton is the combination of probable cause to arrest and an order to alight the automobile.[3] No such nexus between Respondent Miller and the Oldsmobile exists here. Miller was simply a pedestrian when the officers made contact with him.

An officer may have reason to direct the occupant(s) of an

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3 It does not matter whether the automobile was moving and stopped, or was parked, so long as the officer orders the occupant(s) to alight.

automobile to alight, Pennsylvania v Mimms, supra, and officers usually do order people out of cars when they believe the occupants may be armed and dangerous. The Belton rule simply permits a search of the recently occupied automobile when probable cause to arrest, and the arrest occur contemporaneously with the order to alight.[4] See Government of the Canal Zone v Bender, 573 F2d 1329 (CA 5 1978). In Belton itself the lone officer ordered the four occupants of the automobile to alight, then he arrested them and searched the automobile passenger compartment and containers found therein. This Court observed: "We granted certiorari to consider the constitutionally permissible scope of a search in circumstances such as these." Belton, supra, 453 US 457 (emphasis supplied).

Where an officer encounters a pedestrian on the street, even one who has recently left a nearby automobile, but the officer has not removed that person from the automobile, there is not the same need for protecting the officer and thus there is no justification for the use of the Belton rule. The balance between the pedestrian's expectation of privacy in the automobile and its contents and the social need to protect police officers from undue hazards in carrying out their responsibilities is properly observed by use of the general search incident rules found in Chimel-Robinson, supra.

Respondent has found no federal circuit case since Belton which involves an automobile but which does not involve an order to alight. Certainly none of these subsequent cases apply Belton to a pedestrian simply because that pedestrian was an occupant of an automobile just before he was encountered on the street by police.[5] (See also cases cited in Lafave, A Treatise on the

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4 Questions about what is "contemporaneous" to an arrest are endemic to search-incident cases. What is significant in this case is the nexus between the person arrested and the intrusion into the automobile.

5 The following cases decided since New York v Belton factually involve occupants of automobiles who have been

(Footnote Continued on Next Page)

Fourth Amendment, Vol 2, Sec 7.1, main vol. footnote 14, p 500.

The Belton rule is justifiable given some nexus between the automobile, the occupant and the officer's intrusion. That nexus is provided either by requiring (a) preexisting probable cause to arrest followed by an order to alight, or (b) by requiring an order to alight and contemporaneous, albeit subsequently arising, probable cause to arrest (and an arrest). Under either view the present case is distinguishable. Respondent Miller was a pedestrian. The officer did not order Miller to alight the Oldsmobile.

The mere fact of an arrest of a pedestrian outside an automobile is an insufficient nexus to justify the protection-of-the-officer premise of the Belton rule. An illustrative case is United States v McGlynn, 671 F2d 1140, 1144 (CA 8 1982). There a suspect "S" was sitting in a parked Lincoln Continental. He was removed from the Lincoln by officers who then arrested him. The officers had probable cause to arrest "S" prior to removing him from his automobile. The Eighth Circuit upheld the search of the Lincoln's interior on a Belton search-incident theory. McGlynn drove up in a Mazda, parked, and walked over to the arresting officers who arrested him on probable cause. McGlynn had been the sole occupant of the Mazda. The police properly sought a warrant to search the Mazda. Under

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(Footnote Continued From Previous Page)

removed therefrom by police order. United States v Cleary, 656 F2d 1302, 1305 (CA 9 1981) vacated ___ US ___; 102 S Ct 2919; 73 LEd2d 324 (1982); Government of Virgin Islands v Rasool, 657 F2d 582, 587 (CA 3, 1981); Sharpe et al v United States, 660 F2d 967, 979 (CA 4, 1981) vacated ___ US ___; 102 SCt 2951; 73 LEd2d 1345 (1982); United States v Wiga, 662 F2d 1325, 1329 (CA 9, 1981) certiorari den. ___ US ___; 102 SCt 1775; 72 LEd2d 178 (1982); United States v Russell, 670 F2d 323, 325 (CADC 1982) certiorari den. ___ US ___; 102 SCt 2909; 73 LEd2d 1317 (1982); United States v Brown, 671 F2d 585, 586 (CADC 1982); United States v McGlynn, 671 F2d 1140, 1144 (CA 8 1982); United States v Enriquez, 675 F2d 98 (CA 5 1978); Vance v United States, 676 F2d 183, 189-190 (CA 5, 1982). The two vacated cases were ordered to be reconsidered in light of United States v Ross, supra.

United States v Ross, supra, the police could have searched the Mazda if they had search-probable cause. Under Colorado v Bannister, supra, the police could enter the Mazda to seize items in plain view. But no search-incident theory, standing alone, would have supported a warrantless search of the Mazda. Although the Eighth Circuit was not called upon to resolve the legality of a warrantless search of the Mazda, the facts of McGlynn illustrate that the police officers could and did use the warrant system to authorize their search and were not endangered thereby. McGlynn's facts illustrate the appropriate limits of the Belton rule.

The Michigan Court of Appeals did not decide this case inconsistently with New York v Belton, supra, because the factual settings of the two cases are significantly different; this case is not a Belton case. Belton is distinguishable; it does not apply and the ruling below need not be reviewed by this Honorable Court.

C. THE MICHIGAN COURT OF APPEALS CORRECTLY DECLINED TO APPLY, ON AN AD HOC, BASIS THE BRIGHTLINE RULE OF NEW YORK V BELTON TO A DIFFERENT KIND OF FACTUAL SETTING THAN THAT FOR WHICH THE RULE WAS DESIGNED.

> "[T]. . . I do not read New York v Belton [citation omitted] as opting for judicial flexibility in determining on a case to case basis what is reasonable."
>
> Aldrich, J. (concurring) United States v Irizarry, 673 F2d 554, 562 (CA 1 1982)

If the point of New York v Belton, supra, is to provide a standardized procedure then its usefulness is in the assertion that whenever a police officer is confronted by the readily-perceivable fact A then action B is permitted. See LaFave, supra, Vol 2, Sec. 7.1, p 135 (1982 pocket part). The "readily-perceivable fact" of Belton is, the removal of the occupant of the automobile coupled with contemporaneously existing probable cause, not the mere fact of recent occupancy. The mere

fact of recent occupancy of an automobile voluntarily and legally parked at a curbside is an insufficient nexus to bring the instant case within the rule of New York v Belton, supra. The Michigan Court of Appeals could not, except by an inappropriate case-by-case application of Belton, extend the standardized rule to a new and different situation. To have done so would renew the very open-endedness and problematical nature of the scope of the officer's authority to search that this Court sought to avoid by its adoption of a "bright-line" rule in Belton. Consider that if Petitioner's view of Belton were adopted the limits of Belton would blur so that neither police officers, citizens, nor courts could be sure of it true application. The following hypothetical illustrates that lack of discernable limits. Suppose a subject, X, walks over to and enters a car full of people parked in a parking space in a lot next to a city park. X visits for a few minutes and then leaves that car and goes to the next immediately adjacent space to a second car and repeats his visit. Subsequently he visits an additional three cars, each parked, seriatim, in adjoining spaces. Next, X walks away from the last car only to be stopped by a police officer who spots X puffing on a marijuana cigarette. The officer sees a pistol in X's waistband and arrests and handcuffs X before placing him in the back seat of a nearby patrol car. May the officer search each and every car that X has recently been a former occupant of, based upon a search- incident rationale? What if X produces a registration to his own car parked 100 yards across the lot and visible to the officer from the patrol car. X states: "I just drove my car over here to see my friends." Does the search-incident rationale support a search of X's own car? If Belton requires nothing more than recent, former occupancy of a vehicle prior to an arrest then the search-incident rationale permits such searches even if Chimel-Robinson, supra, clearly do not.

Such a result is anomalous. The Michigan Court of Appeals did not apply Belton to uphold the search of the Oldsmobile and Miller's briefcase because Miller was not removed from his car by the police. Rather, he was a pedestrian. The Court could not apply Belton to the present facts without extending it to a new and different situation. It would be wrong for a police officer, or a court, to apply a "bright-line" rule to a different situation altogether by use of interpretation and case-by-case reasoning.

The facts of Belton itself show that it is the removal of the occupants of a car (for the officer's protection) and the subsequent custodial arrest outside the car which constitute the paradigm, or the readily observable fact, justifying the standarized rule. That rule permitted, in Belton, a search incident to arrest of the formerly occupied passenger compartment and containers found therein. The Court in Belton did not state that a search of an automobile is always justified upon the arrest of the "former occupant". Rather, the Court carefully used the term "the occupant", e.g., "when the occupant of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile in which he was riding?" Belton, supra , 453 US 455 (Emphasis supplied). The holding also adverts to "the occupant":

> "[A]. . . we hold that when a policeman has made a lawful custodial arrest of the occupants of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile". Belton, supra, 453 US 460 (Emphasis supplied).

The Court did refer, in Belton to the concept of "former occupancy" by referring to the fact that: "the jacket was located inside the passenger compartment of the car in which the respondent had been a passenger just before he was arrested" Belton, supra, 453 US 462. However, it is clear that in

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-333

STATE OF MICHIGAN,

Petitioner,

vs.

JAMES MILLER,

Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

VIRGINIA M. MELOSKY, being first duly sworn, deposes and says that on NOVEMBER 23, 1982, she mailed one copy of:

Appearance Form
Motion For Leave to Proceed in Forma Pauperis
Affidavit
Respondent's Brief in Opposition
Statement of Mailing

TO: Wayne County Prosecutor
Frank Murphy Hall of Justice
1441 St. Antoine - Rm 1200
Detroit, Michigan 48226

Virginia M. Melosky
VIRGINIA M. MELOSKY

Subscribed and sworn to before me
NOVEMER 23, 1982

Marjorie Hall Henderson
Notary Public, Wayne County, Michigan
My commission expires: 12/19/82

referring to the facts of Belton, the Court was aware that Officer Nicot had initially directed the men to get out of the car. Belton, supra, 453 US 456. Thus, the Court did not mean to expand its holding beyond the particular context of Belton's facts and to state a rule applicable to every case where a pedestrian was arrested and had been, just before, the occupant of a car. "Our holding today does no more than determine the meaning of Chimel's principles in this particular and problematic content. It in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests." Belton, supra, 453 US 460, footnote 3.

Belton did not hold that even where a person has just left his parked car on his own volition and becomes a pedestrian that an ensuing custodial arrest justifies a "search- incident" as to the car. A lone driver who is arrested while depositing coins in a parking meter would, under such a view, suffer a search of his locked and legally parked car and all containers in the interior. Belton does not authorize the search of Miller's car and the seizure of the gun or briefcase. The seizure of the gun in this case was done on the basis of plain view. Colorado v Bannister, supra. Petitioner has not argued and has never argued probable cause as a basis justifying the seizure of the briefcase and its immediate search. Petitioner's search-incident argument must fail as an unusually broad interpretation of Belton, carrying the rule of that case well beyond its factual paradigm setting and rationale. Petitioner's expanded interpretation of Belton destroys the standarization of the rule sought by the Court and reopens the scope of search-incident doctrine to the variables of a case-by-case analysis. The Michigan Court of Appeals correctly eschewed that approach and properly declined to apply Belton's rule to a new and different factual context. There is no merit to Petitioner's claim. The petition for writ of certiorari ought to be denied.

CONCLUSION

For all the foregoing reasons Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

STATE APPELLATE DEFENDER OFFICE

BY: _____
JAMES R. NEUHARD
Defender

By: _____
KIM ROBERT FAWCETT
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, MI 48226
(313) 256-2814

Dated: November 23, 1982

IN THE

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Respondent.

STATEMENT AS TO MAILING

I, JAMES R. NEUHARD, Defender, of the STATE APPELLATE DEFENDER OFFICE hereby state, pursuant to Rule 28.2, that the following papers pertaining to the above captioned cause were deposited at the United States Post Office, General Post Office, 1401 Fort Street, Detroit, Michigan 48226, on November 23, 1982, within the time for filing said papers, and that the same were properly addressed to the Clerk of the United States Supreme Court, and that first class postage was prepared.

The papers so mailed were:

Appearance Form
Motion For Leave to Proceed in Forma Pauperis
Affidavit
Respondent's Brief in Opposition
Statement of Mailing
Proof of Service

STATE APPELLATE DEFENDER OFFICE

BY: _____
JAMES R. NEUHARD
Defender

By: _____
KIM ROBERT FAWCETT
Assistant Defender
Third Floor, North Thower
1200 Sixth Avenue
Detroit, MI 48226
(313) 256-2814

Dated: November 23, 1982

Office - Supreme Court, U.S.
FILED
NOV 29 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-333

STATE OF MICHIGAN,

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JAMES MILLER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE
JAMES R. NEUHARD
Defender

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Assistant Defender
Third Floor, North Tower
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(313) 256-2814

Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

No. 82-333

PEOPLE OF THE STATE OF MICHIGAN,

Petitoner,

vs

JAMES MILLER,

Respondent

APPEARANCE

The Clerk will enter my appearance as Counsel for James Miller, who IN THIS COURT is RESPONDENT.

I certify that I am a member of the Bar of the Supreme Court of the United States:

STATE APPELLATE DEFAENDER OFFICE

BY

JAMES R. NEUHARD
Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, Michigan 48226
(313) 256-2814

Other Counsel Who Should Be Informed:

KIM ROBERT FAWCETT
Assistant Defender
State Appellate Defender Office
Third Floor North Tower
1200 Sixth Avenue
Detroit, Michigan 48226

Dated: November 23, 1982

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-333

STATE OF MICHIGAN,

Petitioner,

vs.

JAMES MILLER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES JAMES MILLER, RESPONDENT in the above captioned cause, by his attorneys, the State Appellate Defender Office, by KIM ROBERT FAWCETT, and requests this Honorable Court to grant leave to proceed in forma pauperis pursuant to Rule 46. The Respondent's affidavit in support of this motion is attached hereto.

STATE APPELLATE DEFENDER OFFICE

BY: JAMES R. NEUHARD
Defender

By: Kim Robert Fawcett
KIM ROBERT FAWCETT
Assistant Defender
Third Floor, North Thower
1200 Sixth Avenue
Detroit, MI 48226
(313) 256-2814

Dated: November 23, 1982

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-333

THE PEOPLE OF THE STATE OF MICHIGAN

Petitioner

-vs-

JAMES MILLER,

Respondent.

AFFIDAVIT TO ACCOMPANY MOTION

FOR LEAVE TO PROCEED IN FORMA PAUPER

STATE OF MICHIGAN)

) SS

COUNTY OF MACOMB)

I, JAMES MILLER being first duly sworn according to law, depose and say in support of my motion for leave to proceed in forum pauperis, without being required to prepay costs of fees:

1. I am the Respondent in the above captioned cause; I am a citizen of the United States of America.

2. Because of my poverty I am unable to pay the costs of defending myself in this cause in this Honorable Court; I am unable to give security for the same.

3. I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition for writ of certiorari are true:

A. I am presently on medical leave from my employer, the Chrysler Corporation.

B. I last worked in early August 1982; my income was about $250.00 per week. I am currently hospitalized at Glen Eden Psychiatric Hospital in Warren, Michigan and my insurance is paying the cost of hospitalization.

C. I receive $200.00 per week income in the form of medical benefits. I support my wife and my three children, ages, 10, 9, and 6 years old. My family rents a residence at 13522 Gallagher, Detroit, Michigan. Our rent is $200 per month.

D. I have received no income in the last twelve months from any business, profession or other form of self employment, or in the form of rent payments, dividends, or other sources. I have no savings or checking accounts or accumulated cash. My wife does not work. I own no real estate, stocks, bonds or notes.

E. I retained attorney Marshall C. Hill, Esquire to represent me in the trial court proceedings in this case. Subsequently I signed an affidvit of indigency on February 10, 1982 in order to obtain a Court appointment for my lawyer as I was no longer able to pay his fee.

Further, I say not.

James Miller

JAMES MILLER

Subscribed and sworn to before me
this 8th day of November, 1982.

Luther Bennett

Notary Public, Wayne County, Michigan
My commission expires:

LUTHER A. BENNETT
Notary Public, Wayne County, MI
My Commission Expires Feb. 2, 1986